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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1209

EUGENE HAIRSTON,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

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INDEX

PAGE

TABLE OF CASES

Ashe v. Swenson, 397 U.S. 436 (1970) 2, 3

Dunne v. United States, 284 U.S. 390 (1932) 2, 3

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Petitioner replies only to the first point raised by the State of Illinois in its Brief in Opposition. The State argues that *Ashe* v. *Swenson,* 397 U.S. 436 (1970), in which this Court held that the doctrine of collateral

estoppel is constitutionally required under the Fifth Amendment's guarantee against double jeopardy, has no relevance to this case. Instead the State advances *Dunne* v. *United States,* 284 U.S. 390 (1932), as stating the appropriate rule, that consistency of verdicts is not a constitutional requisite.

Although the State in its Brief correctly quoted the holding in *Dunne,* it omitted the Court's reasoning:

> "If separate indictments had been presented against the defendant for possession and for maintenance of a nuisance, and had been separately tried, the same evidence being offered in support of each, an acquittal on one could not be pleaded as res judicata of the other. Where the offenses are separately charged in the counts of a single indictment the same rule must hold." 284 U.S. at 393.

In light of *Ashe* v. *Swenson,* petitioner submits that this statement is no longer the law. The reason having failed, the rule in *Dunne* stands in serious question.

Ashe first defines collateral estoppel as the principal that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue may not be litigated by the same parties in any future lawsuit." 397 U.S. at 443. The issue presented by this case is whether this doctrine should apply when the determination occurs not at a prior time but in one and the same proceeding. This situation occurs, when, as here, defendant is acquitted of one charge and convicted of another under circumstances that make the verdicts logically and factually inconsistent. It should be noted in passing that the State in its brief in opposition does not dispute the characterization—made both by petitioner and the Illinois Supreme Court—that the verdicts here

were in fact and in logic irrefutably inconsistent in every way.

This Court in *Ashe* indicated that "the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th Century pleading book, but with realism and rationailty." 397 U.S. at 444. The rule in *Dunne* is an example out of an archaic pleading book, and certiorari should be granted in this case so that it may be re-examined. Certainly, it is time, for as mentioned in the Petition, state courts are in hopeless disarray on the question. See generally Anno., 18 A.L.R. 2d 259; 16 A.L.R. 3d 886.

With it now clear after *Ashe* that collateral estoppel is a matter of "constitutional fact," 397 U.S. at 443, the question of inconsistent verdicts can only be resolved by this Court, and certiorari should be granted in the present case to that end.

Respectfully submitted,

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